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Supreme Court, U.S.
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No. 02-1796

In The

Supreme Court of the United States

MARLIN DAVIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For Eleventh Circuit

PETITIONER MARLIN DAVIS SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED

PREFACE Petitioner sought a Certificate of Appealability ("COA") from denial of relief under 28 U.S.C. § 2255. On January 8, 2003 the United States Court of Appeals for the Eleventh Circuit denied a Certificate. Davis filed a motion for reconsideration, which was denied on February 24, 2003.

On February 25th, this Court decided *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003) which expressly clarified the criteria for COA's. The issues identified in the request for the COA were directly supported by rulings of this Court and several federal appellate courts. Davis promptly filed his Motion for Leave to file a Request for Further Review. The Motion and the Request were returned by the Clerk on the basis that a second Motion for reconsideration was not authorized.

Petitioner Presents Alternative Questions:

Whether this Court should grant certiorari and remand for reconsideration in light of this Court's subsequent decision in Miller-El v. Cockrell.

OR

Whether a COA should have been granted to consider the following issues:

1. *Whether the sentence for conviction under a single-count indictment charging a conspiracy "to distribute controlled substances, that is cocaine, cocaine base (commonly known as crack cocaine) and marijuana" should be based on the controlled substance with the least penalty instead of the substance with the greatest penalty*

2. *Whether ineffective assistance of counsel, by failure to object to the government's pervasive use of Petitioner's*

ethnicity to prove membership in a drug conspiracy, and to prejudice the jury by blaming "Jamaicans" (blacks of Jamaican national origin form the Miami area) of using and exploiting "Americans" (local North Florida blacks as were five of the jurors), violated Petitioner's constitutional rights.

3. *Whether ineffective assistance of counsel, by failure (a) to seek a change of venue, (b) to use the opportunity afforded by the* district court *to conduct a meaningful voir dire of jurors for exposure to newspaper and television reports with extensive reference to Jamaicans and falsely accusing petitioner's brother and sole co-defendant at trial of being a "Drug King" responsible for the well publicized death of a state trooper, and (c) failure to prevent consequence of pretrial publicity from infecting the jury trial proceedings, denied Petitioner's constitutional right to fair trial.*

PARTIES

Marlin Davis

Emerson Davis: Marlin Davis' brother and sole co-defendant at trial has a COA pending in the Eleventh Circuit from the same opinion of the district court denying relief to Marlin Davis. [Reconsideration of the COA was denied on June 24, 2003. A Petition for Certiorari will be filed.]

(Both are presently incarcerated)

I. Supplemental Brief Filed Pursuant to Supreme Court Rule 15

The Petition for Certiorari was filed on May 23, 2003 and docketed on June 11. On June 17, 2003, the Department of Justice promulgated the "Fact Sheet on Racial Profiling." This document supports the issues presented and arguments in the Petition concerning the improper use of ethnicity.

The Solicitor General on June 18, 2003, waived a response to the Petition "unless requested to do so by the court." In light of the proclaimed policy of the Justice Department, it is suggested that it would be appropriate for the Court to request a response concerning the use of ethnicity (as well as the conflict existing on the proper sentence in multi-object conspiracies).

II. Under Principles proclaimed by the President and the Justice Department, this Court in keeping with its own pronouncements, should direct the Eleventh Circuit to issue the Certificate of Appealability.

Petitioner has urged under principals promulgated by this Court in *Batson v. Kentucky,* 476 U.S. 79 (1986) and numerous other cases, that federal courts have a duty to eradicate the use of racism in the administration of justice. This policy has been recognized, broadened and strengthened by the substance and illustrations of the June 17th proclamation that are applicable to *Davis.* As stated in Marlin Davis' Petition, the Government made pervasive use of Jamaican ethnicity (1) to prove membership in a drug conspiracy and not for the purpose of physical identification of unknown persons and (2) to prejudice the jury by blaming Jamaicans (blacks from Miami area of Jamaican national origin) using and exploiting Americans (local North Florida

blacks, as were five of the jurors). The trial excerpts regarding the use of ethnicity contain twenty-three pages. The Petition sets out a few examples at pages 19 through 22. These trial excerpts would be excellent illustrations of what the Justice Department now explicitly condemns in the June 17th document:

> **Stereotyping Certain Races as Having a Greater Propensity to Commit Crimes is Absolutely Prohibited.**

The use of ethnictiy and national origin in the Davis case does not come within the carefully tailored exceptions to the prohibition proclaimed by the Justice Department:

> **Acting on Specific Suspect Identification Does Not Constitute Impermissible Stereotyping.** The situation is different when a federal officer acts on the personal identifying characteristics of potential suspects, including age, sex, ethnicity or race. Common sense dictates that when a victim or witness describes the assailant as being of a particular race, authorities may properly limit their search for suspects to persons of that race. In such circumstances, the federal officer is not acting based on a generalized assumption about persons of different races; rather, the officer is helping locate a specific individual previously identified as involved in crime.
>
> *Example*: While parked by the side of the highway, a federal officer receives an "All Points Bulletin" to be on the look-out for a fleeing bank robbery suspect, a man of a particular race and particular hair color in

> his 30s driving a blue automobile. The officer may use this description, including the race of the particular suspect, in deciding which speeding motorists to pull over.
>
> * * *
>
> *Example*: The victim of an assault at a local university describes her assailant as a young male of a particular race with a cut on his right hand. The investigation focuses on whether any students at the university fit the victim's description. Here investigators are properly relying on a description given by the victim, part of which included the assailant's race. Although the ensuing investigation affects students of a particular race, that investigation is not undertaken with a discriminatory purpose. Thus use of race as a factor in the investigation, in this instance, in permissible.

In full accord with the statements and illustrations of federal policy quoted above, the Petition for Certiorari at page 20 stated,

> There is a constitutional difference between using color or race to physically identify an individual otherwise unknown and using color or race to identify the members of a conspiracy. Here Jamaican was the litmus test for proving membership in the charged drug conspiracy. The physical identity argument borders on being outright specious. There was not an identity issue of unknown persons – all of the witnesses who identified and testified against Marlin Davis or Emerson Davis personally knew who they were.

> *This was not a rape victim describing an unknown attacker or a wanted bulletin physically describing a fugitive for identification by strangers* (emphasis added).

The Government's use of ethnicity was not to identify unknown persons but instead for the purpose of developing the Government's prejudicial theme of "Jamaicans" versus "Americans" before a jury with five "Americans." Racial ethnicity and national origin were presented at every opportunity. For example, the Government introduced into evidence pictures of known black persons who then were further disclosed to be Jamaican [Blacks] or American [also Blacks].

> Q: And, who is in the photograph? [Exhibit 12]
> A: Me, Mercy, Marlin and Jubee. The other two I don't know.
>
> * * *

After the witness identified the picture of the Defendant Marlin Davis and his co-defendant Emerson [Mercy] Davis, whose Jamaican heritage was well known to the jury, the witness was asked:

> Q: Now is Jubee an American or is Jubee a Jamaican?
> A: As far as I know, he's Jamaican.

When the pervasive comments on national origin are coupled with pretrial publicity and government witnesses' testimony of Jamaicans using the Americans to sell drugs and testimony stating all the Jamaicans had been indicted, the unconstitutional use of ethnicity would seem incontrovertible.

In the Davis trial, there were no drugs in evidence. The alleged involvement in a very loosely defined conspiracy to sell and distribute drugs in North Florida, Alabama and Georgia was based upon self-serving testimony of persons seeking a reduction in sentence. The weakness in proof and credibility of the testimony to show membership in the conspiracy was supplied by ethnicity. Without the use of ethnicity in the context of pretrial publicity, Marlin Davis would not have been convicted.

To accomplish the purpose manifested by the long-standing pronouncements of this Court and the recent proclamation by the Justice Department, questions raising the misuse of ethnicity are not to be shunned or avoided by denial of COAs. Here, the government on direct appeal avoided the issue by blaming the court appointed trial counsel for failure to object. This necessitated the request for relief for ineffective assistance of counsel under §2255 [At trial, the government had adroitly negated the defense counsel's Motion in Limine prohibiting "Jamaican posse" by skipping the word "posse" and peppering the record with "Jamaican"]. The bright light of judicial review needs to illuminate and redress the improper use of ethnicity. The public policy of the United States should not be an empty gesture of principles.

Respectfully submitted,

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